2. The assets distributed by the Estate Company in its statutory liquidation in December of 1938 were not assets of the estate but were assets which, under the express terms of the stipulation, belonged wholly and completely to the Estate Company.

3. Such distribution was not then made "to the taxpayers in proportion to their original interests in the estate subject to payment of decedent's debts." The distribution was to *the corporation's stockholders in proportion to their stockholdings* and subject to the remaining debts *of the corporation*. It is expressly so stipulated. (R. 40, 114.)

4. The stocks issued by the Estate Company did not "correspond" with the interests of the legatees in the estate even at the time of their original issuance, as some were sold by the executors and some were issued in connection with the corporation's refinancing of its obligations. At the time of the 1938 distribution the relationship had been further broken as Mrs. Bishop had turned in $1,000,000 of Class C Preferred to the corporation to apply on Bishop's obligations to it and there had been transfers of other stockholdings, including one of common stock. (R. 39, 95, 96, 117.) There was no restriction on such transfers by taxpayers.

(*Query:* Is the decision below to be applied to a stockholder who was never a legatee? Are taxpayers to be penalized because they were legatees and did not sell?)

5. In spite of implications to the contrary in Respondent's statement, Bishop was not insolvent when Mather first loaned his collateral to Bishop, and it is expressly stipulated and found that neither in making such loan nor in the execution of the accommodation note was any gift made or intended. (R. 36.)

6. Mather's estate tax was compromised by a lump-sum settlement and the Board of Tax Appeals' dollar judg-

ment. Memoranda prepared in connection with such settlement included a deduction from values for the then estimated outcome of Mather's accommodation liability on the Bishop note; but there was never any determination by the Commissioner or finding by the Board allowing such deduction.

7. The stipulated record shows that the Estate Company was formed and the estate's assets and liabilities were duly transferred to it in order (a) *"to prevent"* the disastrous liquidation of the estate; and (b) to accomplish the present satisfaction of its obligations and the prompt discharge of the executors. (R. 84-85, 96 Sec. XIV.) It was not "to provide time for the *ultimate* payment of obligations of the estate" and the distribution of its "assets to the legatees under Mather's will." There is not the slightest suggestion in the record of an intent to extend the estate's activities or carry them out through corporate form. Inherent in every provision of the agreements and the stipulations is the duly accomplished purpose to permanently reset the situation in actual corporate form and promptly, completely and finally close the estate and all of its activities and relationships. In a dozen paragraphs of the stipulation the Commissioner has agreed to and confirmed the due and complete actuality and finality of the steps so taken. Neither in conference or before the Tax Court did he ever contend otherwise. It will indeed be making new law if he can now support the fictitious conception of these stipulated actualities invented by the Tax Court and affirmed by the Circuit Court.

8. It is not true that taxpayers agreed to assume payment of the accommodation obligation "only out of the assets transferred to them in exchange for their common stock * * *." Their assumption of such obligation was full, personal, unconditional, necessary and direct to the creditors. (See our Original Brief pp. 23, 24.)

ARGUMENT.

Respondent here continues his tactics (successfully employed in the courts below) of avoiding the real issues by implying other issues (without developing them) in the hope that space will not permit an answering analysis and the court will seize thereon to support Respondent's unsound position.

Petitioners below did not rely "mainly" upon *Shiman v. Commissioner*, 60 F. (2) 65. They relied mainly upon the unconditional provisions of Section 23(k)(1), I. R. C., and the proven and admitted fact that their 1939 payments created debts from Bishop to them, in law and in fact, and that such debts became worthless.

In their effort to meet one of the varied and shifting grounds then advanced by the Commissioner to justify his denial of the deductions claimed, they used the *Shiman* case for exactly what it held, namely: that where the bad debt arose from a required payment on a valid accommodation obligation, its deduction could not be denied because it was worthless when it arose.

If and to the extent that the deducted debt from Bishop was disallowed by the Court below because it was worthless when it arose, then such decision is in direct conflict with the *Shiman* case.

If the decision below is based only upon the fictitious substance that the Estate Company had no actuality and the executors paid the accommodation note and distributed the net estate to taxpayers,—then, of course, there is no conflict with the *Shiman* case and the conflict is with *Eisner v. Macomber* and its associated cases cited in our brief.

The *Shiman* case has nothing to do with such fictions, and petitioners never claimed it had.

At no time here involved were taxpayers "residuary legatees" with rights against Mather's estate. Any rights they had as legatees had been satisfied and the estate closed years before.

There is no effort here to utilize the transactions "to obtain income tax deductions" not otherwise allowable. If the estate had paid the accommodation obligation and distributed the net residue (as assumed by the Court below), it would have been entitled to the bad debt deduction. Petitioners only claim a similar right. Respondent's position seeks, by confusion, to deny the deduction to anyone. The executors cannot have it because they did not exist when the payments were made. Under the assumed fiction, petitioners cannot have it because the executors paid. It is the taxpayers, not the government, who are made to sit down between the chairs.

In Respondent's brief comment on *Breyer v. Commissioner*, C. C. A. 3, he implies that the decision below in our cases was in some way based upon the theory that petitioners were mere volunteers. This further illustrates the casual shifting of position by Respondent which has contributed to the fantastic conclusion reached below. The Tax Court, as will be seen from its opinion, added this volunteer theory to support its conclusion. The subject was briefed to the Circuit Court of Appeals and, of course, fell flat on analysis and was not used by that Court in the opinion sought to be reviewed here. Petitioners were in no sense, or under any decided case, volunteers.*

The *Breyer* and *Koppers* cases are in conflict with the instant decision in their holdings that a transferee is as

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* *Interstate Transit Lines v. Commissioner*, 319 U. S. 590, and *Welch v. Helvering*, 290 U. S. 111, referred to by Respondent in this connection, merely announce the principle that payments made by taxpayers to discharge debts of another for which taxpayers were not obligated did not, under the circumstances there involved, amount to ordinary and necessary expenses of the taxpayers' businesses. *Deputy v. DuPont*, 308 U. S. 438, holds that the expense to taxpayer of carrying stock borrowed in connection with short sales made by him did not, under the circumstances there involved, constitute ordinary and necessary business expense. These decisions can have no possible relevancy to any issue involved in the instant cases.

much entitled to deductions as a transferor, unless the section of the Revenue Act providing for such deductions contains a limitation to the contrary. They were cited originally by petitioners for that purpose.

Another aspect of the *Breyer* and related cases cited by Respondent has an interesting application here. In each of those cases the taxpayer took gross assets *direct* from an estate subject to estate tax debts which had not been discharged.

In summarizing and affirming the position of the Tax Court in our cases, the Court below said:

> "Had Mather's estate been administered in the customary manner the petitioners would have made no payments upon the joint note, for the indebtedness would have been discharged before * * * receipt of their distributive shares."

Had a similar fiction been indulged by the Court in the *Breyer* case (or the other estate cases), it would have said:

> "Had the estate been administered in the customary manner, Breyer (or the other legatees) would have made no payment on account of interest on the estate tax, for the indebtedness would have been discharged before * * * receipt of his distributive share";

and the question discussed at such length in the *Breyer* and such other cases (as to whether the legatees, who took direct distribution of the gross estate subject to tax debts, were paying interest on "their own debts") would not have been the decisive factor or possibly even discussed.

If, in the instant cases taxpayers (who, as stockholders of the corporation, received assets and assumed debts on a statutory corporate liquidation years after the winding up of Mather's estate) can be taxed as if the estate had paid the debts and distributed the net assets of the corporation as the net assets of the estate years after it was closed, certainly Breyer and the others, *who took*

gross assets direct from active executors should have been so taxed. The fact that such rule of fiction was not so applied in the *Breyer* and related cases brings them into conflict with the decision below in the instant cases. And the fact that the Commissioner *did not even suggest* the application of such rule of fiction in the *Breyer* and related cases clearly should, and does, make it embarrassing for him to attempt to support it here.

We agree with Respondent that *Eisner v. Macomber* and associated cases should be "far removed from the present controversy," in which the facts are clearly stipulated without question of their actuality. Nevertheless, the rule of substance which such cases announce was the essential premise of the decision below; and it is the fictitious application of that rule by the Court below (when the rule should be "far removed from the present controversy") which creates the principal conflict of decisions requiring review by this Court.

CONCLUSION.

For the reasons stated above and in their original briefs, petitioners request that their petitions for writs of certiorari be granted.

Respectfully submitted,

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